(2)

Supreme Court, U.S.
FILED
JUN 23 1994
OFFICE OF THE CLERK

No. 93-1547

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1993

IN RE:
DAVID L. SMITH

Petitioner

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

BURNS, FIGA & WILL, P.C.
Phillip S. Figa
One DTC, Penthouse Three
5251 DTC Parkway
Englewood, Colorado 80111
(303) 796-2626

ATTORNEYS FOR PETITIONER

June 23, 1994

14 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUPPLEMENT TO PETITION FOR
WRIT OF CERTIORARI 1

APPENDIX. A-01

TABLE OF AUTHORITIES

Page

Cases

Digital Equipment Corp. v. Desktop Direct, Inc.,
62 U.S.L.W. 4457 (1994) 5

Dunkin v. Louisiana Pacific Corp.,
No. 93-1878 (filed May 18, 1994) 5

G.J.B. & Associates, Inc. v. Singleton,
913 F.2d 824 (10th Cir. 1990) 3

In re Smith,
No. 93-1547, Petition for Writ of Certiorari 2, 6

Landgraf v. USI Film Products,
511 U.S. ____, 114 S.Ct. 1483 (1994) 4

McKnight v. General Motors Corporation,
62 U.S.L.W. 3771 (1994) 1-8

Rivers v. Roadway Express, Inc.,
511 U.S. ____, 114 S.Ct. 1510 (1994) 4

Statutes, Rules and Regulations — Page

42 U.S.C. § 1981, Section 101, Civil Rights Act of 1991 4,10

Rule 10.1, U.S. Supreme Court Rules 7

Rule 15.7, U.S. Supreme Court Rules 1

Rule 3.1, American Bar Association Model Rules 3, 4

Rule 3.1, Colorado Rules of Professional Conduct 3, 4

No. 93-1547

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1993

IN RE:
DAVID L. SMITH

Petitioner

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

David L. Smith, Esq., by his undersigned attorneys and pursuant to Rule 15.7 of the Supreme Court Rules, hereby submits this supplement to his Petition for Writ of Certiorari presented to this Court on March 31, 1994.

By this supplement, the petitioner seeks to call the Court's attention to its recent opinion in *McKnight v. General Motors Corporation*, 62 U.S.L.W. 3771 (1994). App. at 1 (reprinted from U.S.L.W., May 24, 1994 ed.). By its *per curiam* opinion, this Court announced its position regarding appeals of matters which are the subject of a split of authority among the lower courts,

holding that such appeals are not sanctionable because the rule of law involved is "not so clear as to make [the] position frivolous." *McKnight v. General Motors Corporation*, 62 U.S.L.W 3771 (1994). App. at 2. Thus, it is now apparent that the advancement of a position contrary to a particular circuit's precedent, where the issue is "not so clear" among the lower courts, does not make the advancement of that position frivolous, or, correspondingly, sanctionable.

McKnight supports Mr. Smith's assertion that the underlying conduct for which he was suspended, namely, asserting the interlocutory jurisdiction of the Tenth Circuit over attorney fee sanctions imposed by the district court, was not frivolous, not sanctionable, and, therefore, should not have resulted in his suspension from the practice of law. In three of the four cases relied on by the Tenth Circuit in suspending Mr. Smith, he was sanctioned for asserting a jurisdictional position well-grounded in law and fact, recognized as such by several circuits, and not contrary to any Supreme Court precedent. *See In re Smith*, No. 93-1547, Petition for Writ of Certiorari at 23-28. Indeed, the

Tenth Circuit itself has recognized that this question of interlocutory jurisdiction over appeals of attorney fee sanctions is one which is the subject of a "sharp split between the circuit courts." *G.J.B. & Associates, Inc. v. Singleton*, 913 F.2d 824, 829 (10th Cir. 1990). Under the rule of *McKnight*, the entry of such sanctions against Mr. Smith for advancing a legal argument, albeit contrary to precedent of the Tenth Circuit, but nevertheless recognized as the subject of a "sharp split" of authority, was erroneous. It follows then that his suspension, particularly to the extent that it is based on his consistent assertion of that jurisdictional position on appeal, magnifies that error.

Rule 3.1 of both the American Bar Association Model Rules and the Colorado Rules of Professional Conduct[1] provide, in pertinent part that: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of

---

[1] Mr. Smith maintains his practice in the State of Colorado.

existing law." Clearly, *McKnight* stands for the proposition that, in the absence of controlling authority from this Court, a lawyer asserting a legal argument recognized as valid by some lower courts is not in violation of Rule 3.1 even if advanced in a circuit bound by contrary precedent.

Additionally, although it is not essential for this Court to reach the precise issue which is the subject of this split of authority among the circuits in order to find that Smith's suspension was improperly imposed, *McKnight* nevertheless supports the notion that resolution of the jurisdictional conflict is appropriate and necessary. In *McKnight* both the parties and the Court had the benefit of independent rulings by this Court on the underlying issue which was the subject of the split of authority relevant to the *McKnight* appeal, namely the retroactivity of section 101 of the Civil Rights Act of 1991, 42 U.S.C. § 1981. The cases of *Landgraf v. USI Film Products*, 511 U.S. ____, 114 S.Ct. 1483 (1994), and *Rivers v. Roadway Express, Inc.*, 511 U.S. ____, 114 S.Ct. 1510 (1994), were decided by this Court just prior to its consideration of the petition for certiorari and the sanctions issue

presented therein. In this case, however, this Court has not spoken on the interlocutory jurisdictional question presented by this petition. Even if, as in *McKnight*, the underlying issue is determined adversely to the position asserted by the petitioner, the resolution of the underlying issue would serve to clarify and offer guidance on a question which has vexed the circuit courts for over a decade and further the interest of judicial economy. Petitioner and his counsel are unaware of any action on which the Court has accepted review which confronts this issue.[2] Thus, this case provides an appropriate avenue by which this Court may finally resolve this question.[3]

---

[2] This issue is, however, being raised by Mr. Smith in a separate Petition for Writ of Certiorari. *See Dunkin v. Louisiana Pacific Corp.*, No. 93-1878 (filed May 18, 1994).

[3] In reference to a then-pending case before this Court dealing with interlocutory appeals from orders of dismissal pursuant to settlement, Mr. Smith suggested in his Petition for Writ of Certiorari that the Court "may wish to use this case to clarify the *Cohen* rule should *Digital Equipment Corp. v. Desktop Direct, Inc.* prove to be an inadequate vehicle for clarifying the law in this area." *In re Smith*, No. 93-1547, Petition for Writ of Certiorari at 32 n. 6. This Court recently issued its opinion in *Digital Equipment*, 62 U.S.L.W. 4457 (1994). Since *Digital Equipment* is

Additionally, Mr. Smith's situation is far more serious than that of the petitioner's attorney in *McKnight*. The latter was sanctioned in the relatively small amount of $500, whereas Mr. Smith has been suspended from the practice of law in the Tenth Circuit until "each sanction order of [the Tenth Circuit] or the district court has been satisfied." *In re Smith*, 10 F.3d 723 (10th Cir. 1993). These sanctions now total more than $50,000, which he is financially unable to satisfy, thus subjecting Mr. Smith to multiple, excessive punishment for the same conduct. Furthermore, due to the reciprocal discipline rules of other courts before which Mr. Smith practices (including this Court), he is in further danger of being subjected to identical and simultaneous discipline in those courts, thus destroying completely his liberty and property interests in his good name, his reputation and his right and ability to engage in his livelihood.

---

essentially limited to the context of settlement agreements, the application of the *Cohen* doctrine in the context of appeals from attorney fee sanctions remains the subject of a sharp split among the circuit courts that can, and the petitioner submits, should be resolved in this case.

The Tenth Circuit's view regarding its interlocutory jurisdiction and its unfettered imposition of sanctions for asserting such jurisdiction, despite a "sharp split" of authority on the question, as well as the eventual suspension of those who offer a challenge to that view, stands in direct contravention to the recently announced precedent of this Court in *McKnight v. General Motors Corporation*. Absent review by this Court, the judgment of the Tenth Circuit will continue to impact the petitioner improperly and unjustly, as well as others before that court making good faith arguments on subjects which are not yet clear under the law. Thus, this petition represents Mr. Smith's only chance to challenge his suspension and restore his ability to practice law and engage in his livelihood as well as seek resolution of the jurisdictional issue which underlies the entire matter.

For these and the other reasons stated in the Petition for Writ of Certiorari, this Court should grant the petitioner's request for review. Accordingly, the petitioner respectfully submits that he has demonstrated that there are "special and important reasons" for review by this Court, S. Ct. R. 10.1, that his only recourse is

before this Court, and that his petition for writ of certiorari to the Tenth Circuit Court of Appeals should be granted. Notwithstanding, should this Court elect not to use this case to resolve the underlying circuit split regarding the interlocutory jurisdiction of the circuit courts, the petitioner respectfully requests that, at a minimum, and based on *McKnight*, this Court grant the Petition for Writ of Certiorari, vacate the Tenth Circuit's November 29, 1993 Order suspending the petitioner and remand this case for further proceedings consistent with *McKnight*.

Respectfully submitted,

Phillip S. Figa
BURNS, FIGA & WILL, P.C.
One DTC, Penthouse Three
5251 DTC Parkway
Englewood, Colorado 80111
Telephone: (303) 796-2626

Attorneys for Petitioner

[Reprinted from]
5-24-94 *The United States* LAW WEEK 62 LW 3771

JOURNAL OF PROCEEDINGS

May 23, 1994

92-1113 McKnight v. General Motors Corporation.

Per Curiam.

After petitioner appealed the dismissal of his employment discrimination claim, respondent moved for dismissal of the appeal and for sanctions. Respondent argued that the appeal was frivolous in light of controlling decisions of the Court of Appeals for the Seventh Circuit holding that § 101 of the Civil Rights Act of 1991, 105 Stat. 1071, 42 U.S.C. § 1981 (1988 ed., Supp. IV), does not apply to cases arising before its enactment. *See Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (1992). In an order dated September 30, 1992, the Court of Appeals granted respondent's motion, dismissed the appeal, and imposed a $500 sanction on petitioner's attorney.

The Court of Appeals correctly rejected petitioner's argument that § 101 applies retroactively. *See Landgraf v. USI Film Products*, 511 U.S. ____ (1994); *Rivers v. Roadway Express, Inc.*, 511 U.S. ____ (1994). However, if the only basis for the order imposing sanctions on petitioner's attorney was that his retroactivity argument was foreclosed by circuit precedent, the order was not proper. As petitioner noted in his memorandum opposing dismissal and sanctions, this Court had not yet ruled on the application of § 101 to pending cases. Filing an appeal was the only way petitioner could preserve the issue pending a possible favorable decision by this Court. Although, as of September 30, 1992, there was no circuit conflict on the retroactivity question, that question had divided the District Courts and its answer was not so clear as to make petitioner's position frivolous. *See Mozee, supra*, at 940-941 (Cudahy, J., dissenting).

Accordingly, the petition for a writ of certiorari is granted, the order imposing sanctions is vacated, and the case is remanded for further proceedings consistent with this opinion.